Toffoloni v. LFP Publishing Group, LLC Doc. 50 Att. 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI, as Administrarix and Personal Representative of the ESTATE OF NANCY E. BENOIT, Plaintiff, v. LFP PUBLISHING GROUP, LLC, d/b/a Hustler Magazine, MARK SAMANSKY, an Individual, and other distributors and sellers of, Hustler Magazine, as Defendants X, Y, and Z, Defendants.	)))))))))))))))))	CIVIL ACTION FILE NO. 1:08-CV-0421-TWT

BRIEF IN SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT AS TO LIABILITY

COMES NOW, Plaintiff, Maureen Toffoloni, as Administratrix and Personal Representative of the Estate of Nancy E. Benoit, through counsel and files this Brief in Support of her Motion for Partial Summary Judgment pursuant to Fed. R. Civ. P. Rule 56(d)(2) for partial summary judgment against the Defendant, LFP Publishing Group, LLC, d/b/a Hustler Magazine, as follows:

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STATEMENT OF THE CASE

As this Court is well aware, on June 25, 2009, the United States Court of Appeals for the Eleventh Circuit held that the Defendant, LFP Publishing Group, LLC d/b/a Hustler Magazine's ("Hustler") use of nude and partially nude images (the "images") of Nancy E. Benoit in its March 2009 edition "[did] not qualify for the newsworthiness exception to the right of publicity" which exists in favor of the decedent and her Estate under Georgia law. *See Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1210 (11th Cir. 2009). That opinion was upheld on August 27, 2009 when the Eleventh Circuit unanimously denied Hustler's motions for rehearing and rehearing *en banc*.

Thus, notwithstanding Hustler's threat to file a petition for writ of certiorari to the United States Supreme Court, the law of this case is clear: Hustler has violated the Plaintiff's right of publicity, i.e., the Plaintiff's right to control "when and whether images of her daughter are made public in order to maximize the economic benefit to be derived from her daughter's posthumous fame." *Toffoloni*, *supra* at 1213. Although a careful reading of the Court of Appeals' decision reveals that that Court found liability, Hustler's counsel have stated that they do not agree with that interpretation of the Eleventh Circuit Court of Appeals' decision. *Toffoloni*, *supra* at

p. 1213. It is the purpose of Plaintiff's Motion for Partial Summary Judgment to obtain an order which provides that Hustler has violated Plaintiff's right of publicity. The case will then proceed to discovery on the damages sustained by Plaintiff as the result of Defendants' violation.

ARGUMENT AND CITATION OF AUTHORITY

Hustler may contend that Plaintiff has no damages; that Hustler's use of the images for commercial purposes had no economic value, or that Plaintiff's damage as the result of such use is *de minimis*. Be that as it may, Defendant cannot deny that, by publishing the images of Nancy E. Benoit without permission and without compensation, Defendant has violated Plaintiff's right of publicity. There is simply no other way to read the opinion of the Court of Appeals in this case. Thus, liability has been finally and conclusively established by the Court of Appeals, unless and until the Supreme Court of the United States takes a different legal position.

Plaintiff should not be required to expend her time, energy, and severely limited financial resources proving, or responding to Defendant's discovery requests, concerning an issue that has already been decided. *See* *Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201 (11th Cir. 2009).

It is statutory law under Fed. R. Civ. P. Rule 56(d)(2) that a party may move for partial summary judgment, as to any party on any issue, including the issue of Defendant's liability to the Plaintiff. *See*, *e.g.*, F.R.C.P. Rule 56(c); *see also*, *Madeirense Do Brasil S/A v. Stulman-Emerick Lumber Co.*, 147 F.2d 399 *cert denied*, 325 U.S. 861 (1982).

In this case, there is no genuine issues of material fact with respect to Hustler's liability to the Plaintiff for violation of her right to publicity.

(1) Hustler has admitted that it published the images of Nancy E. Benoit in its March 2008 edition;

(2) Hustler has admitted that it did not seek or obtain the permission of Nancy E. Benoit or her Estate to use these images; and

(3) Hustler has admitted that it did not compensate Nancy E. Benoit or her Estate for its use of these images.

CONCLUSION

Under *Toffoloni v. LFP Publishing Group, LLC*, Hustler has no defense to Plaintiff's claim that Hustler violated her right of publicity. Hustler's liability to the Plaintiff for its use of these images has been finally and conclusively established.

Thus, Plaintiff is entitled, as a matter of law, to judgment against Hustler on the issue of liability, leaving the issue of Plaintiff's damages for later adjudication by a jury.

Respectfully submitted October 16, 2009.

/s/ Richard P. Decker
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CERTIFICATE OF SERVICE

This is to certify that on October 16, 2009, I have electronically filed the foregoing Motion for Partial Summary Judgment as to Liability and Brief in Support thereof with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorney(s) of record:

James Clifton Rawls, Esq.
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and by placing a copy of same in the United States Mail in a properly addressed envelope with adequate postage thereon to:

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